Petition

81-1561

No.

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In The Supreme Court of the United States

OCTOBER TERM, 1981

MICHAEL P. LANE,
ILLINOIS DIRECTOR OF CORRECTIONS,
PETITIONER,
VS.
MELVIN LEE SMITH,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

TYRONE C. FAHNER
Attorney General
State of Illinois

MELBOURNE A. NOEL, JR.
MICHAEL B. WEINSTEIN
CAROLYN B. NOTKOFF
Assistant Attorneys General
188 West Randolph Street
Suite 2200
Chicago, Illinois 60601
(312) 793-2570

Counsel for Petitioner.

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QUESTION PRESENTED

In light of *Raffel v. United States* and *Jenkins v. Anderson*, may a prosecutor cross-examine a defendant about, and later comment upon, his failure to mention his alleged alibi at any time prior to his trial testimony?

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MICHAEL P. LANE,
ILLINOIS DIRECTOR OF CORRECTIONS,
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VS.
MELVIN LEE SMITH,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Michael P. Lane respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, which on remand from this Court, affirmed the decision of the United States District Court for the Northern District of Illinois, Eastern Division, ordering the issuance of a writ of habeas corpus in this proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals, one judge dissenting, is reported at 660 F.2d 237, and appears herein as Appendix B. The memorandum opinion of the district court is attached hereto as Appendix C.

JURISDICTION

The judgment of the Court of Appeals affirming issuance of a writ of habeas corpus was entered on Aug. 26, 1981. A petition for rehearing en banc was timely filed and then denied by a 5 to 3 vote of the full court on Nov. 19, 1981. See Appendix A. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1), and 28 U.S.C. § 2101(c) which allows this Petition to be filed within 90 days of the judgment of the Court of Appeals.

STATEMENT OF THE CASE

This case revolves around comments made by the prosecutor in his closing argument at respondent's jury trial for armed robbery. In his petition for a writ of habeas corpus, respondent alleged that these comments impermissibly referred to his pre-trial silence and thus violated his fifth and fourteenth amendment rights.

In 1974, respondent was tried for armed robbery and found guilty. On January 30, 1975, he was sentenced to four years to four years and a day in prison. The Illinois Appellate Court affirmed the conviction, *People v. Smith,* 52 Ill. App. 3d 358, 367 N.E. 2d 756 (1977), and the Illinois Supreme Court denied a petition for leave to appeal on January 26, 1978. This Court denied certiorari on May 1, 1978. *Smith v. Illinois,* 436 U.S. 961 (1978). Respondent then sought a writ of habeas corpus from the United States District Court. The writ was granted on August 21, 1979 and the Seventh Circuit Court of Appeals affirmed on March 21, 1980. On the State's first petition for certiorari, this Court granted the petition, vacated the judgment and remanded for reconsideration in light of *Jenkins v. Anderson,* 447 U.S. 231 (1980). See 49 U.S. L.W. 3244 (Oct. 7, 1980) sub nom. *Franzen v. Smith,* No.

79-2004. After receiving further briefs from the parties, the Court of Appeals once again affirmed issuance of the writ on August 26, 1981, finding *Jenkins* not applicable to the present case. It is from the second affirmance that petitioners now seek certiorari.

At trial, the victim of the armed robbery, Claudia Jean Watson, testified that she observed respondent removing money from the cash register. (T. Tr. 179)[1] She further testified that when respondent pointed the gun at her, he was approximately two feet from her, and that she had the opportunity to observe his face for two or three minutes. (T. Tr. 180-81) Shortly thereafter, Ms. Watson had another opportunity to view respondent for an additional forty-five to sixty seconds. (T.Tr. 183) She stated she was positive that respondent was the man[2] who pointed the gun at her. (T. Tr. 181) Her determination of respondent's height, however, was inaccurate (T. Tr. 176, 233).

Respondent presented an alibi defense and he and his girlfriend, Betty Walls, testified they were home together on the night of the robbery. (T. Tr. 214, 233) On cross-examination, Ms. Walls testified that she was uncertain as to which night respondent was home with her and that she was uncertain as to whether or not he was home the week following the robbery. (T. Tr. 216-18) She also stated that a police officer had come to her residence the evening of the trial but that she had not talked to him. (T.Tr. 225) Respondent testified that he told the officer he could talk to Ms. Walls in the presence of respondent's lawyer. (T. Tr. 236).

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[1] (T. Tr. ____) refers to the relevant page of the trial transcript.

[2] Two other men also participated in the armed robbery. (T. Tr 173-75)

Part of the closing argument[3] for the prosecution was as follows:

> The defense is alibi. Now, this is a very interesting alibi. I want you all to think what you would do in a situation like this, what you would do, and if you feel that this alibi was handled the way you would handle it I will be surprised.
>
> * * *
>
> In fact, yesterday when we attempted to talk to her [Ms. Walls] about an alibi she wouldn't talk to us, she wouldn't talk to the police officer. Melvin Smith, the same guy that wasn't at the hearing, that hid in the back, maybe, told her not to. If you had what this is supposed to be, an ironclad alibi, you were home with your spouse, or your friend, or your buddy, or girl friend or boy friend and you knew it, one week from the day that the thing happened, had happened on a late Monday, early Tuesday, and you knew on Monday or Sunday next that he was supposed to, wouldn't you run to the police and say: 'Hey, look, he was with me, he didn't do it.'
>
> Which one of you would not? They didn't. They had no obligation to. By the way, they have no obligation to tell us anything, but wouldn't you, if you were innocent and if you had a loved one in trouble, run in and tell the police? You're right, you would.

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[3] The closing arguments as to the alibi defense are set forth in greater detail in the district court's opinion in Appendix C.

(T. Tr. 248-50) After defense counsel's closing arguments, the prosecutor made, *inter alia,* the following comments in his rebuttal argument:

> And even when the police were out there to ask her about it she wouldn't talk — or he wouldn't let her talk about it. That's a curious thing. Why, why wouldn't anybody talk about the alibi until we get to Court?

(T. Tr. 264) The jury found respondent guilty of armed robbery. (T. Tr. 281)

At the hearing on respondent's post-trial motion on January 30, 1975, his new counsel raised, for the first time, his objections to the prosecutor's closing arguments insofar as they were claimed to be impermissible comments upon silence. (H. Tr. 18-26, 66-68, 71-72)[4] The trial judge held that the comments had not violated petitioner's right to remain silent. (H. Tr. 86-87)

The Illinois Appellate Court affirmed the conviction, rejecting respondent's argument that *Doyle v. Ohio,* 426 U.S. 610 (1976) was applicable under the facts of the case. *People v. Smith,* 52 Ill. App. 3d 583, 367 N.E. 2d 756, 762 (2d Dist. 1977). The court found that "an unbiased reading of the entire record clearly reveals that the prosecutor was referring to the [respondent's] undisputed ordering of the witness to refuse to talk to the prosecutor's representative and not of any failure or refusal of the [respondent] himself to speak."367 N.E. 2d at 762.

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[4] (H. Tr. ____) refers to the relevant page of the transcript of the post-trial hearing.

On collateral review, however, the District Court and the Court of Appeals disagreed with the state court's determination and held the prosecutor's comments embraced respondent's own pre-trial silence, thus giving rise to constitutional error. Petitioners now bring this petition for a writ of certiorari seeking reversal of the Seventh Circuit's affirmance of the issuance of the writ of habeas corpus.[5]

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I.

THE ISSUE RAISED BY THIS CASE WAS LEFT UNANSWERED BY *DOYLE V. OHIO* AND *JENKINS V. ANDERSON;* IT SHOULD BE RESOLVED TO PERMIT PROSECUTORIAL CROSS-EXAMINATION AND COMMENT UPON A TESTIFYING DEFENDANT'S FAILURE TO MENTION HIS ALLEGED ALIBI BEFORE TRIAL.

Certiorari was granted in *Doyle v. Ohio,* 426 U.S. 610, 616 (1976) to decide "whether impeachment use of a defendant's post-arrest silence violates any provision of the Constitution. . . ." The question in *Jenkins v. Anderson,* 447 U.S. 231, 232 (1980) was "whether the use of prearrest silence to impeach a defendant's credibility violates either the Fifth or Fourteenth Amendments to the Constitution." The issue in the instant case centers on whether a prosecutor's remarks in closing arguments, allegedly referring to respondent's pretrial

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[5] Respondent has been free on bail pending the disposition of these proceedings.

silence about his alibi defense,[6] give rise to reversible constitutional error. This issue has yet to be decided by this Court. *See Doyle,* 426 U.S. at 616 n. 6. The Seventh Circuit recognized this fact in their opinion, citing the same footnote in *Doyle.* App. at 6b.

Petitioners submit that the Seventh Circuit's affirmative answer to this question conflicts with the applicable rationale of *Raffel v. United States,* 271 U.S. 494 (1926), a decision whose relevance was rejected by the Seventh Circuit even though it had been cited, with approval, by this Court in *Jenkins. Raffel* held that a defendant's silence at his first trial was admissible when he testified in his own defense at his second trial, for impeachment purposes, without violating the fifth amendment. In *Jenkins,* 447 U.S. at 237 n.4, the majority opinion noted that "[N]o Court opinion decided since *Raffel* has challenged its holding that the Fifth Amendment is not violated when a defendant is impeached on the basis of his prior silence." The Seventh Circuit Court of Appeals here denied the relevance of *Raffel* to any comment on post-arrest silence by inexplicably observing that the policies behind the fifth and fourteenth Amendments are different and then relying solely on the fourteenth. Petitioner submits that *Jenkins'* revitalization of *Raffel* permits the application of *Raffel* to the instant case. This Court's treatment of *Raffel* makes clear that it governs comments on a testifying defendant's silence, except in a specific *Doyle* situation. *Jenkins,* 447 U.S. at 237-39.

The fact situations in *Raffel* and this case are highly analogous. The defendant in *Raffel* relied on his fifth amendment right in not taking the witness stand at his first trial.

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[6] Petitioners still maintain that the prosecutor's remarks neither embraced, nor were directed towards, respondent's own pretrial silence. *See People v. Smith,* 52 Ill. App. 3d 583, 367 N.E.2d 756, 762 (2d Dist. 1977).

Respondent and his alibi witness were silent prior to trial in this case because respondent's trial counsel believed the Illinois Alibi Defense Statute, Ill. Rev. Stat. 1973, ch. 38, § 114-14, was unconstitutional in light of *Wardius v. Oregon*, 412 U.S. 470 (1973). Thus, Raffel's silence and respondent's silence were based on interpretations of their constitutional rights but not on specific invocations of those rights. At his second trial, when he testified, Raffel's prior silence was properly used to impeach him even though it was based upon a constitutional right. Respondent testified in his own behalf at his trial and, assuming *arguendo*, that the prosecutor's remarks did encompass respondent's prior silence, such remarks properly discredited his alibi defense and did not amount to constitutional error.

The Seventh Circuit and the District Court have, in misinterpreting *Raffel*, improperly extended *Doyle*. This Court made clear that its decision in *Doyle* did not reach an accused's silence in other postarrest, pretrial situations. *Doyle*, 426 U.S. at 616 n.6. Furthermore, the giving of *Miranda* warnings was a crucial factor on which the decision rested. *Id.* at 617. The Court of Appeals' majority opinion in the instant case admits that *Doyle* did not decide the question at bar and then goes on to expand the *Doyle* ruling to this case in spite of the significant factual differences between the two cases and in spite of this Court's desire to limit *Doyle* as revealed in *Jenkins v. Anderson*, 447 U.S. 231, 239-40 (1980).

The facts in the case at bar are not even analogous to the *Doyle* situation. Petitioner's silence was not maintained in a custodial setting immediately after arrest. Nor was his silence an exercise of his *Miranda* rights. As Judge Fairchild pointed out in his dissent in the present case, the petitioner here has not even met his burden of showing that *Miranda* warnings were ever even given to him. *United States ex. rel. Smith v. Franzen*, Appendix B at 9b. (7th Cir. Aug. 26, 1981).

Respondents submit, therefore, that the reasoning of *Doyle* is inapposite and the decision herein has unduly expanded that ruling.

Petitioner suggests that *Doyle* ought to be limited to those custodial or interrogation situations where a suspect has remained silent immediately upon receiving warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). The rationale of *Doyle* should not be extended to apply to a defendant's noninterrogation strategy of remaining silent about his alibi until trial.

II.

THE SEVENTH CIRCUIT COURT OF APPEALS ERRED IN ADOPTING THE DISTRICT COURT'S HOLDING THAT CERTAIN PROSECUTORIAL COMMENTS DURING CLOSING ARGUMENTS REFERRED TO RESPONDENT'S PRE-TRIAL SILENCE.

The District Court concluded "[T]hat the prosecutor's comments were directed towards the [respondent's] failure to come forward at any time prior to trial with his alibi defense. . . . " App. C at 10c. Petitioners submit this is an erroneous conclusion and that a careful analysis of the facts reveal otherwise.

In his closing argument, the prosecutor sought to emphasize that respondent's alibi witness, by failing to go to the police with the alibi, behaved differently than most people would if the alibi were true. The prosecutor argued that "she didn't turn to the police and say '[H]e couldn't have done it, he was with me,'" and "wouldn't you run to the police and say 'Hey look, he was with me, he didn't do it.'" (T.Tr. 248-50) Immediately thereafter, the prosecutor used the word "they":

> Which one of you would not? They didn't. They have no obligation to tell us anything, but wouldn't

> you, if you were innocent and if you had a loved one in trouble, run in and tell the police? You're right, you would.

(T. Tr. 264)

The Illinois Appellate Court concluded with respect to these comments that "[T]he prosecutor was referring to the [respondent's] undisputed ordering of the witness to refuse to talk to the prosecutor's representative." *People v. Smith*, 52 Ill. App.3d 583, 367 N.E. 2d 756, 762 (2d Dist. 1977). Although the district court notes that the appellate court's interpretation has some support in the record,[7] it finds that the appellate court's analysis is not persuasive. App. C at 7c-8c.

The prosecutor also referred to "if you were innocent" (T. Tr. 250) and "Why, why wouldn't anybody talk about the alibi until we get to court?" (T. Tr. 264)

The district court notes that neither the Supreme Court nor the Seventh Circuit has yet specifically set forth a test to determine when ambiguous prosecutorial comments will constitute an invasion of the defendant's right to remain silent after arrest. App. C at 8c. The court then applies the standard followed by the Seventh Circuit in cases where the issue is whether indirect prosecutorial statements constitute impermissible comment upon a defendant's failure to testify. App. C at 9c. The two-part test is: (1) whether the comment is "manifestly intended" to refer to a defendant's silence, or (2) whether the comment is of such a character the jury would "naturally and necessarily" take it to be a comment on a

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[7] The district court states: "Presumably, this conclusion was drawn from the prosecutor's cross-examination of Ms. Walls, T. TR., at 224-227, and petitioner's trial testimony that when the police officer had come to interview Ms. Walls on the day before the trial began, petitioner had instructed the officer that Ms. Walls would only talk to the officer in the presence of petitioner's attorney. T. Tr., at 236." App. C at 8c.

defendant's silence. *United States v. Lyon,* 397 F.2d 505, 509 (7th Cir.), *cert. denied,* 393 U.S. 846 (1968). The district court stated that the prosecutor did not "manifestly intend" to include respondent in his remarks. However, the court found that the jury would "naturally and necessarily" take the remarks to be a comment on respondent's silence. App. C at 9c.

In the context of the prosecutor's entire argument, his use of the words "they", "if you were innocent", and "anybody" was a mere, inadvertent slip of the tongue, which did not change the focus of his statements to include respondent. Note, for example, the prosecutor's statement, "If you had what this is supposed to be, an ironclad alibi . . . wouldn't you run to the police and say, 'Hey, look, he was with me, he didn't do it.'" (T.Tr. 250) Nobody who hears such a sentence is going to think that the speaker is referring to respondent. Obviously, the prosecutor was speaking about the witness, not respondent, and simply twisted his words — a common occurrence when a person is composing as he argues instead of reading a prepared statement. Likewise, when the prosecutor used "they", he was not referring to respondent's silence. This is apparent from the context of the entire closing argument. *See United States v. Wagner,* 497 F.2d 249 (10th Cir. 1974). (Prosecutor's reference to "his testimony" in closing argument held to be a faulty grammatical reference made during a summation of the evidence.)

This Court has stated:

> [A]ll closing arguments of counsel, are seldom carefully constructed *in toto* before the event; improvision frequently results in syntax left imperfect. While these general observations in no way justify prosecutorial misconduct, they do suggest that a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damag-

> ing meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.

Donnelly v. DeChristoforo, 416 U.S. 637, 646-47 (1974).

In *United States v. Reicin,* 497 F.2d 563 (7th Cir.), *cert. denied,* 419 U.S. 996 (1974), the defendant claimed that he was denied a fair trial because the prosecutor commented, in closing argument, on his failure to take the witness stand. The prosecutor had stated: "Reicin says, through other witnesses, . . ." and "for some reason that only Reicin knows. . . ." The first statement was used on *several* occasions. In failing to find that the jury would "naturally and necessarily" take the language to be comment on the defendant's failure to testify, the court stated:

> [P]erhaps [the comments are] an inartful locution for a prosecutor who should not only refrain from commenting on the failure of a defendant to take the witness stand but should guard against the appearance of doing so, nevertheless, in the context of the extensive argument in this case we do not read in these introductory remarks the illative meaning that the defendant finds.

Id. at 572.

As in *Reicin,* the prosecutor's comments in the present case may be an "inartful locution," but in the context of the entire argument, the comments do not refer to the respondent's silence; the jury would not "naturally and necessarily" interpret them as such.

Therefore, this Court should grant certiorari to review the conclusions of the district court and the Seventh Circuit.

III.

THE SEVENTH CIRCUIT COURT OF APPEALS ERRED IN ADOPTING THE DISTRICT COURT'S HOLDING THAT CERTAIN PROSECUTORIAL COMMENTS DURING CLOSING ARGUMENT DID NOT CONSTITUTE HARMLESS ERROR.

This Court has held that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). In the present case, there is not a reasonable possibility that the prosecutor's comments might have contributed to the conviction.

Respondent was positively identified as one of the robbers by Claudia Jean Watson, the night auditor held at gunpoint during the robbery. She had ample opportunity to observe the robber, having been in a well-lit area, less than four feet away from him, and having looked directly at his face for three to four minutes. (T. Tr. 170-71, 180-83, 193) Ms. Watson concentrated on the robber's features so as to remember them and to be able to later identify him. (T. Tr. 184) Less than a week later, Ms. Watson positively identified respondent from photographs shown to her by police. (T. Tr. 185, 190) These photographs included pictures of two of respondent's brothers. (T. Tr. 29-30) She subsequently identified respondent in a lineup and at trial. (T. Tr. 181, 189) The fact that there was some discrepancy in height between Ms. Watson's description and respondent is not significant where Ms. Watson was so certain of his face. Her testimony stood up under vigorous cross-examination. (T. Tr. 190-97)

Respondent's alibi witness was his girlfriend, Betty Walls. On cross-examination, Ms. Walls was uncertain as to which night respondent was home with her, although she claimed to

know that it was the night of the robbery. She was also unable to recall where respondent had been on any other day that week. (T. Tr. 216-24) Her testimony was substantially impeached at trial.

Because the prosection witness's identification of respondent was unwavering, petitioners submit that a writ of certiorari should issue to correct the erroneous decisions of the district court and the Seventh Circuit.

CONCLUSION

For the above reasons, petitioner asks this Court to grant him a Writ of Certiorari to review the erroneous decision of the Court of Appeals below.

TYRONE C. FAHNER
Attorney General
State of Illinois

MELBOURNE A. NOEL, JR.
MICHAEL B. WEINSTEIN
CAROLYN B. NOTKOFF
Assistant Attorneys General
188 West Randolph Street
Suite 2200
Chicago, Illinois 60601
(312) 793-2570

Counsel for Petitioner.

February 17, 1982.

Appendix

APPENDIX A

In The
United States Court of Appeals
For The Seventh Circuit

Chicago, Illinois 60604
November 19, 1981

No. 79-2107

UNITED STATES OF AMERICA ex rel.
MELVIN LEE SMITH,

Petitioner-Appellee,

vs.

CHARLES J. ROWE AND WILLIAM KLUSAK,

Respondents-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.

No. 78-C-2853 — Hubert L. Will, *Judge*

Before WALTER J. CUMMINGS, *Chief Judge,* LUTHER M. SWYGERT, *Senior Circuit Judge,* THOMAS E. FAIRCHILD, *Senior Circuit Judge,* WILBUR F. PELL, JR., *Circuit Judge,* ROBERT A. SPRECHER, *Circuit Judge,* WILLIAM J. BAUER, *Circuit Judge,* HARLINGTON WOOD, JR., *Circuit Judge, and* RICHARD D. CUDAHY, *Circuit Judge.*

On consideration of the petition for rehearing and suggestion for rehearing en banc, filed in the above-entitled cause

by respondents-appellants, a vote of the active members of the court was requested, and a majority of the active members have not voted to grant a hearing en banc. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

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* Circuit Judges Pell, Sprecher, and Bauer voted to grant the petition for rehearing en banc.

APPENDIX B

In The United States Court of Appeals For The Seventh Circuit

No. 79-2107

UNITED STATES OF AMERICA ex rel. MELVIN LEE SMITH,

Petitioner-Appellee,

vs.

GAYLE M. FRANZEN, et al.,

Respondents-Appellants.

On Remand from the Supreme Court of the United States

AUGUST 26, 1981

Before, CUMMINGS, *Chief Judge,* SWYGERT, *Senior Circuit Judge,* and FAIRCHILD, *Circuit Judge.*

SWYGERT, *Senior Circuit Judge.* Petitioner Melvin Lee Smith was convicted of armed robbery in a jury trial in the Circuit Court of Kane County, Illinois. The Illinois Appellate Court affirmed, *People v. Smith,* 52 Ill. App.3d 358, 367 N.E.2d 756 (1977), the Illinois Supreme Court denied leave to appeal, and the United States Supreme Court denied certiorari, *Smith v. Illinois,* 436 U.S. 961 (1978).

Petitioner then filed this petition for a writ of habeas corpus in the United States District Court for the Northern District of Illinois. That court granted the writ, and this court affirmed, *United States ex rel. Smith v. Rowe,* 618 F.2d 1204 (7th Cir.

1980). The Supreme Court granted certiorari, 49 U.S.L.W. 3244 (No. 79-2004, Oct. 7, 1980), and remanded the case to this court for reconsideration in light of *Jenkins v. Anderson*, 447 U.S. 231 (1980).

Pursuant to our Circuit Rule 19, the parties have submitted additional briefs to the court on the issue that is before us on remand: whether the prosecutor's comments in closing argument about the failure of petitioner and his witness to come forward with his alibi prior to trial constituted constitutional error. We conclude that the prosecutor's attempt to impeach petitioner by his post-arrest silence amounted to a violation of the right to fundamental fairness guaranteed by the Due Process Clause. We therefore affirm the order of the district court granting the writ of habeas corpus.

I.

Petitioner was arrested for armed robbery on April 1, 1974; he was indicted in June, 1974, tried on September 30 and October 1, 1974, and convicted. At trial, both petitioner and his girlfriend, Betty Walls, testified that they were home together on the night of the robbery. On cross-examination, Walls testified that a police officer came to her home the evening before petitioner's trial, but she refused to talk to him; she also stated that petitioner was present. Petitioner testified that he told the police officer that he could interview Walls only in the presence of petitioner's attorney.

In his closing argument, the prosecutor stated:

> The defense is alibi. Now, this is very interesting alibi. I want you all to think what you would do in a situation like this, what you would do, and if you feel that this alibi was handled the way you would handle it I will be surprised.
>
> * * *

Okay. That when she finds out that he is arrested for this offense, the day she found out she claims it was Sunday, he says it was Monday, she's a little mixed up on her days, but when she found out she didn't turn to the police and say: 'For Godsake, he couldn't have done it, he was with me.' No, this alibi couldn't come out right then and there.

In fact, yesterday when we attempted to talk to her about an alibi she wouldn't talk to us, she wouldn't talk to the police officer. Melvin Smith, the same guy that wasn't at the hearing, that hid in the back, maybe, told her not to. If you had what this is supposed to be, an ironclad alibi, you were home with your spouse, or your friend, or your buddy, or girl friend or boy friend and you knew it, one week from the day that the thing happened, had happened on a late Monday, early Tuesday, and you knew on Monday or Sunday next that he was supposed to, wouldn't you run to the police and say: 'Hey, look, he was with me, he didn't do it.'

Which one of you would not? They didn't. They had no obligation to. By the way, they have no obligation to tell us anything, but wouldn't you, if you were innocent and if you had a loved one in trouble, run in and tell the police? You're right, you would.[1]

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[1] As we noted in our earlier opinion, the prosecutor was correct in stating that neither petitioner nor his witness had any duty to come forward with his alibi: "absent an alibi statute that passes constitutional muster, *Wardius v. Oregon*, 412 U.S. 470...(1973), there was no obligation on Smith or Walls to inform the police or the prosecution of the alibi." 618 F.2d at 1206.

In his rebuttal to the defense attorney's closing argument, the prosecutor commented:

> And even when the police were out there to ask her about it she wouldn't talk — or he wouldn't let her talk about it. That's a curious thing. Why, why wouldn't anybody talk about the alibi until we get to Court?

Petitioner contends that the prosecutor's attempts to impeach defendant's alibi testimony by his post-arrest silence violated his Fifth Amendment right to remain silent and his due process rights.

II

As a preliminary matter, we must consider whether the prosecutor's comments referred to petitioner's silence or only to the silence of his alibi witness.[2] The district court held, and this court agreed, that although the primary focus of the prosecutor's closing argument was on impeaching Walls's testimony, at times his language clearly referred to both petitioner's and Walls's failure to come forward with the alibi before trial. *United States ex rel. Smith v. Rowe,* 618 F.2d 1204, 1210 (7th Cir. 1980) (district court's opinion reprinted in appendix to this court's opinion). Further, the district court found that the prosecutor's remarks would "naturally and necessarily" be taken by the jury as references to petitioner's silence. *Id.* at 1210-11.

Petitioner contends that *Doyle v. Ohio,* 426 U.S. 610 (1976), controls this case. In *Doyle,* petitioners at trial testified to an exculpatory version of the facts that they had not previously told to the police or prosecutor. The prosecutor

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[2] Petitioner does not challenge the prosecution's attempt to impeach the credibility of his defense witness by her prior silence.

then cross-examined them about their failure to give that explanation to the police at the time of their arrest. The Supreme Court held that the use of petitioners' silence at the time of their arrest to impeach their trial testimony violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 619. The Court reasoned that

> [s]ilence in the wake of these [*Miranda*] warnings may be nothing more than the arrestee's exercise of these . . . rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested. . . . Moreover, while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

Id. at 617-18.

As we noted in our previous opinion, however, "*Doyle* left open the very question presented in the instant case." 618 F.2d at 1206. The Supreme Court in *Doyle* dealt with impeachment by silence at the time of arrest, just after *Miranda* warnings were given, and while the arrestee was in custody, and did not consider the question whether the prosecutor's references to petitioners' failure to tell their exculpatory story at any time prior to trial were unconstitutional.[3] Because the

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[3] The Court stated:

> Petitioners also claim constitutional error because each of them was cross-examined by the prosecutor as to why he had not told the exculpatory story at the preliminary hearing or

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right to remain silent operates from the time of interrogation or arrest through the trial, absent a valid waiver, we find that the *Doyle* reasoning applies to the instant case and thus hold that the prosecutor's comments violated petitioner's due process rights.

Respondents submit that the analysis in *Jenkins v. Anderson*, 447 U.S. 231 (1980), addresses the issue presented in this case. In *Jenkins*, petitioner testified at trial that he had acted in self-defense; in cross-examination and closing argument, the prosecutor attempted to impeach petitioner's credibility by referring to his pre-arrest silence. The Supreme Court held that the use of pre-arrest silence did not violate either the right to remain silent or due process.[4] *Id.* at 238, 240. Respondents would have us adopt the reasoning of *Jenkins* because in both *Jenkins* and the case at bar the silence at issue occurred in a noncustodial situation and in those circumstances the distinction between pre- and post-arrest silence is unimportant. We cannot agree with that analysis; *Jenkins*

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> any other time prior to the trial. . . . [This] averment[ ] of error present[s] different considerations from those implicated by cross-examining petitioners as defendants as to their silence after receiving *Miranda* warnings at the time of arrest. In view of our disposition of this case we find it unnecessary to reach these additional issues.

Doyle, supra, 426 U.S. at 616 n. 6.

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[4] The Court in *Jenkins* expressly distinguished *Doyle*:

> In this case, no governmental action induced petitioner to remain silent before arrest. The failure to speak occurred before the petitioner was taken into custody and given *Miranda* warnings. Consequently, the fundamental unfairness present in *Doyle* is not present in this case.

Jenkins, supra, 447 U.S. at 240.

does not consider the question of post-arrest silence, and is not analogous to the instant case.

Respondents also argue that the holding in *Raffel v. United States,* 271 U.S. 494 (1926), which the Supreme Court reaffirmed in *Jenkins, supra,* 447 U.S. at 235, controls this case. In *Raffel,* the defendant did not testify at his first trial. At his second trial, the defendant took the stand and was cross-examined about his prior silence. The Court held that impeaching a defendant who chooses to testify by his earlier silence does not violate the Fifth Amendment. *Raffel, supra,* 271 U.S. at 496-97.

We find that *Raffel* is legally distinguishable from the case at bar. The *Raffel* Court relied solely on the Fifth Amendment right to remain silent and its underlying policies.[5] We base our decision today upon the right to fundamental fairness guaranteed by the Due Process Clause, as did the Supreme Court in *Doyle, supra,* 426 U.S. at 618. The policies underlying the fundamental fairness doctrine of the Fourteenth Amendment are different from those underlying the Fifth Amendment. Therefore, analysis of the use of impeachment by post-arrest silence under the Due Process Clause compels a consideration of different factors than does analysis of the same question under the Fifth Amendment.

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[5] The Court, in *Raffel* reasoned:

> The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do. There is a sound policy in requiring the accused who offers himself as a witness to do so without reservation, as does any other witness. We can discern nothing in the policy of the law against self-incrimination which would require the extension of immunity to any trial or to any tribunal other than that in which the defendant preserves it by refusing to testify.

271 U.S. at 499.

In the case at bar, the prosecutor's comments referred generally to petitioner's failure to come forward with the alibi at any time prior to the trial and specifically to petitioner's silence when the police came to his home on the evening before his trial. All of the prosecutor's references thus related to petitioner's silence after his arrest and therefore, presumably, after he received *Miranda* warnings.[6] The reasons relied on by the Supreme Court in *Doyle* to find a violation of fundamental fairness are equally applicable to the case at bar: first, petitioner's failure to come forward with his alibi prior to trial is ambiguous because his silence could indicate *either* that he was exercising his right to remain silent *or* that his alibi was a recent fabrication; second, the *Miranda* warnings imply that the government will not penalize a criminal defendant who exercises his right to remain silent. Further, the record indicates that petitioner's counsel chose to withhold notice of the alibi defense based on his conclusion that the Illinois Alibi Defense Statute, Ill. Rev. Stat. ch. 38, § 14-14, was unconstitutional after the Supreme Court's decision in *Wardius v. Oregon*, 412 U.S. 470 (1973). Under these circumstances, we believe that the prosecutor's attempt to impeach petitioner's alibi by his post-arrest silence constituted a denial of due process. *See Williams v. Zahradnick*, 632 F.2d 353, 360 (4th Cir. 1980).

The district court concluded that the error in this case was not harmless; we affirmed that finding in our prior opinion, *United States ex rel. Smith v. Rowe, supra*, 618 F.2d at 1207, 1213-14 & n.8. For the reasons stated in the opinion of the

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[6] There is nothing in the record that indicates whether or not petitioner received the *Miranda* warnings at the time of his arrest. We presume that proper procedure was followed. Further, petitioner's statement to the police that they could interview Walls only in the presence of his attorney indicates awareness of the rights to remain silent and have an attorney present during questioning.

district court, we reaffirm our holding that the prosecutor's comments were not harmless error. *See Williams v. Zahradnick*, 632 F.2d 353, 364-65 (4th Cir. 1980); *United States v. Shavers*, 615 F.2d 266, 269-70 & n.6 (5th Cir. 1980); *Chapman v. United States*, 547 F.2d 1240, 1249 (5th Cir.), *cert. denied*, 431 U.S. 908 (1977). Accordingly, we affirm the order of the district court granting the writ of habeas corpus.

FAIRCHILD, *Circuit Judge*, dissenting.

I respectfully dissent. I cannot join in the opinion because there is no showing that the petitioner was given *Miranda* warnings. It is the giving of the *Miranda* warning that triggers the holding of *Doyle* and it would be petitioner's burden to show that that predicate existed.

A true Copy:
Testee:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

In The United States District Court For The Northern District Of Illinois Eastern Division

UNITED STATES OF AMERICA ex rel. MELVIN LEE SMITH,
Petitioner,

vs.

CHARLES J. ROWE, Director, Illinois Department of Corrections, and WILLIAM KLUSAK, Sheriff, Kane County, Illinois,
Respondents.

No. 78 C 2853

MEMORANDUM OPINION

Petitioner Melvin Lee Smith brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on the ground that the state court prosecutor committed constitutional error in his closing argument to the jury and that such error was not harmless beyond a reasonable doubt. Specifically, petitioner contends that the prosecutor commented upon petitioner's failure to come forward prior to trial with the alibi to which petitioner testified at trial, and that such comment constituted impermissible impeachment by use of post-arrest silence in contravention of *Doyle v. Ohio*, 426 U.S. 610 (1976).

This case comes before the Court on respondent's motion to dismiss and petitioner's motion for summary judgment. While this is a close case insofar as the existence of constitutional error is concerned, for the reasons hereinafter stated we grant petitioner's motion for summary judgment and grant the writ.

BACKGROUND

Petitioner was tried in the Circuit Court of Kane County on September 30 and October 1, 1974 on the charge of having committed an armed robbery at the Hilton Inn in North Aurora, Illinois on March 26, 1974. At trial, petitioner advanced an alibi defense and both he and his girl friend, Ms. Betty Walls, testified that they had been home together on the night of the robbery. After the close of the evidence, the prosecutor made the following statements in his initial closing argument:

> The defense is alibi. Now, this is a very interesting alibi. I want you all to think what you would do in a situation like this, what you would do, and if you feel that this alibi was handled the way you would handle it I will be surprised.
>
> * * *
>
> In fact, yesterday when we attempted to talk to her [Ms. Walls] about an alibi she wouldn't talk to us, she wouldn't talk to the police officer. Melvin Smith, the same guy that wasn't at the hearing, that hid in the back, maybe, told her not to. If you had what this is supposed to be, an ironclad alibi, you were home with your spouse, or your friend, or your buddy, or girl friend or boy friend and you knew it, one week from the day that the thing happened, had happened on a late Monday, early Tuesday,

> and you knew on Monday or Sunday next that he was supposed to, wouldn't you run to the police and say: 'Hey, look, he was with me, he didn't do it.'
>
> Which one of you would not? They didn't. They had no obligation to. By the way, they have no obligation to tell us anything, but wouldn't you, if you were innocent and if you had a loved one in trouble, run in and tell the police? You're right, you would.

Trial Transcript (T. Tr.), at 248-250. Following defense counsel's closing argument, the prosecutor made the following comments in his rebuttal argument with respect to the alibi defense:

> And even when the police were out there to ask her about it she wouldn't talk — or he wouldn't let her talk about it. That's a curious thing. Why, why wouldn't anybody talk about the alibi until we get to Court?

T. Tr., at 264. The jury found petitioner guilty of armed robbery.

Subsequent to petitioner's conviction, petitioner retained different counsel for the purpose of filing post-trial motions. Post-trial motions were heard by the trial judge on January 30, 1975. During the hearing, petitioner's new counsel raised for the first time his objection to the prosecutor's closing arguments insofar as the comments upon petitioner's prior silence were concerned. Hearing Transcript (H.Tr.), at 18-26, 66-68, 71-72. The trial judge concluded, however, that the prosecutor's closing argument had not violated the petitioner's right to remain silent. H. Tr., at 86-87. Petitioner was sentenced to four years and one day imprisonment.

Petitioner appealed his conviction to the Appellate Court of Illinois, Second Judicial District. *People v. Smith,* 52

Ill.App.3d 358, 367 N.E.2d 756 (2d Dist. 1977). One of the issues raised on appeal was whether petitioner's constitutional privilege against self-incrimination had been violated by the prosecutor's closing arguments to the jury. Rejecting petitioner's reliance upon *Doyle v. Ohio, supra,* the appellate court concluded that

> [a]n unbiased reading of the entire record clearly reveals that the prosecutor was referring to the defendant's undisputed ordering of the witness to refuse to talk to the prosecutor's representative and not of any failure or refusal of the defendant himself to speak.

52 Ill.App.3d at 591, 367 N.E.2d at 762. The Illinois Surpeme Court denied leave to appeal, and the United States Supreme Court denied certiorari. *Smith v. Illinois,* 436 U.S. 961 (1978). This habeas corpus petition followed.

VIOLATION OF PETITIONER'S DUE PROCESS RIGHTS

Petitioner contends that the prosecutor's comments in closing argument impermissibly referred to petitioner's pretrial silence and thereby violated both his fifth amendment right to remain silent and his due process rights. In the context of this case, petitioner's argument raises two important questions: (1) were the prosecutor's comments directed towards *petitioner's* failure to come forward with the alibi defense, and (2), if so, does the prosecutorial comment on the petitioner's failure to come forward constitute constitutional error?

Insofar as the first of these questions is concerned, a fair reading of the trial transcript and the closing arguments by both the prosecutor and petitioner's trial counsel indicates that the primary focus of the prosecutor's comments insofar as petitioner's alibi defense was concerned was toward Ms.

Walls' failure to give a similar story to the police *at any point* prior to trial.[1] In so arguing, the prosecutor clearly sought to

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[1] Since these comments can only be interpreted within the context of the full closing arguments as to the alibi defense issue, these portions of the arguments are set forth.

Initial closing argument for the prosecution:

> The defense is alibi. Now, this is a very interesting alibi. I want you all to think what you would do in a situation like this, what you would do, and if you feel that this alibi was handled the way you would handle it I will be surprised.
>
> Okay. They say that here is Melvin Smith living with Betty, that they have been living together for awhile, that he stays home on a regular basis, that he's not working and she's not working, so they must be getting along pretty good if you're going to stay in because it's pretty tough to stay in the house day in and out. They have enough feeling for one another. They live together, play cards together, stay together even though they're not married.
>
> Okay. That when she finds out that he is arrested for this offense, the day she found out she claims it was Sunday, he says it was Monday, she's a little mixed up on her days, but when she found out she didn't turn to the police and say: 'For Godsake, he couldn't have done it, he was with me.' No, this alibi couldn't come out right then and there.
>
> In fact, yesterday when we attempted to talk to her about an alibi she wouldn't talk to us, she wouldn't talk to the police officer. Melvin Smith, the same guy that wasn't at the hearing, that hid in the back, maybe, told her not to. If you had what this is supposed to be, an ironclad alibi, you were home with your spouse, or your friend, or your buddy, or girl friend or boy friend and you knew it, one week from the day that the thing happened, had happened on a late Monday, early Tuesday, and you knew on Monday or Sunday next that he was supposed to, wouldn't you run to the police and say: 'Hey, look, he was with me, he didn't do it.'

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> Which one of you would not? They didn't. They had no obligation to. By the way, they have no obligation to tell us anything, but wouldn't you, if you were innocent and if you had a loved one in trouble, run in and tell the police? You're right, you would.

T.Tr., at 248-250.

Closing argument for the defense:

> So, coupled with that we have got what Mr. Puklin refers to as the alibi defense, and legally that's what it's called is an alibi defense. Now, alibi has a bad connotation, or at least to me it sounds bad, alibi, but that's what it's called.
>
> And sure, when I was picking you people on the jury, when Mr. Puklin was picking you I asked you questions now about what if we don't put on any evidence, what if Melvin doesn't testify, and that's because that's a very difficult choice for me to make. I put this girl on the stand, she's never been in Court before, she's not an experienced witness by any means. I don't know what Mr. Puklin is going to be able to do to her, what a skillful cross examiner is going to get her to say.
>
> I sumit to you that had Mr. Puklin enough time or the desire to do so he could have had her confused about her name. But we do have her here saying: 'I was living with Melvin, we were staying together, he was home that night.' We have Melvin saying he was home that night. Mr. Puklin says: 'Okay, why didn't you tell the police? You would have all told the police.' I have no doubt in my mind that every one of you would have gone to the police and said: 'Hey, you get him out, he didn't do it, he was with me.'
>
> Well, just for a minute pretend that you're in your early twenty's, and you're black, and you're living in Aurora and you have a boy friend charged with armed robbery and you know he was with you. Are you going to the police and say: 'Hey, that's my boy friend, he was with me, you guys are wrong?' Of course you're not. It's unfortunate, but if you're black and you're that age and you're in Aurora the police are on the other side, they're not on your side, so you don't run to the police and tell them your story, probably would rather stay out of the whole thing.

T.Tr., at 256-57.

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impeach Ms. Walls' veracity as a witness in support of petitioner's alibi defense.[2] Notwithstanding the prosecutor's primary focus upon impeaching Ms. Walls' testimony, it is clear that on several separate occasions during his closing arguments, one of which was of significant duration, the prosecutor's language literally embraced both petitioner and Ms. Walls.

The Illinois Appellate Court concluded with respect to these comments that "the prosecutor was referring to the defendant's undisputed ordering of the witness to refuse to

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Rebuttal closing argument for the prosecution:

> Okay. Doubt has to be a reasonable one. I think what you saw here was a man who has been identified, who has been captured and a loved one doing whatever she can to get him out of this. I believe they have both lied under oath. I don't believe the doubt they have tried to create is a reasonable doubt in light of what you would do if you had an ironclad alibi for a loved one.
>
> And, you know, I don't go this bit about she being twenty years old, and black, and on Aid in Aurora and the police hate people that are black. I don't care what color you are, if you got an ironclad alibi it doesn't hurt to walk downtown and tell the police, they're not going to do anything to you.
>
> And even when the police were out there to ask her about it she wouldn't talk — or he wouldn't let her talk about it. That's a curious thing. Why, why wouldn't anybody talk about the alibi until we get to Court?

T.Tr., at 263-64.

[2] Petitioner does not here challenge the constitutionality of the impeachment of a defense witness by that witness' prior silence, nor do we perceive any constitutional defect in such prosecutorial comment in this case. *See United States v. Fouras*, 497 F.2d 1115, 1120, (7th Cir. 1974); *Shadd v. United States*, 423 F.Supp. 511, 514 (W.D. Pa. 1976).

talk to the prosecutor's representative." *People v. Smith, supra,* 52 Ill.App.3d at 591, 367 N.E.2d at 762. Presumably, this conclusion was drawn from the prosecutor's cross-examination of Ms. Walls, T.Tr., at 224-227, and petitioner's trial testimony that when the police officer had come to interview Ms. Walls on the day before the trial began, petitioner had instructed the officer that Ms. Walls would only talk to the officer in the presence of petitioner's attorney. T.Tr., at 236.

While the appellate court's interpretation of the prosecutor's comments has some support in the record, we do not find the appellate court's analysis persuasive. 28 U.S.C. § 2254(d)(8). In his comments preceding his repeated references to "they", T.Tr., at 250, the prosecutor had discussed broadly Ms. Walls' failure to come forward *at any time* prior to the trial, as well as discussing Ms. Walls' failure to come forward on the day prior to her actual testimony. In addition, he also referred to "if you were innocent", T.Tr., at 250, and "Why, why wouldn't *anybody* talk about the alibi until we get to Court?" T.Tr., at 264 (underscoring supplied). Viewing the prosecutor's comments as a whole, they are clearly susceptible of being interpreted as referring to both petitioner and Ms. Walls' failures to come forward at any time before trial.

Notwithstanding our conclusion that the prosecutor's literal language also embraced the defendant's pretrial silence, the question remains whether these comments are, for purposes of constitutional analysis, to be deemed a reference to the defendant's prior silence. Neither the Supreme Court nor the Seventh Circuit has yet specifically set forth a test to determine when ambiguous prosecutorial comments will constitute an invasion of the defendant's right to remain silent after his arrest. However, at least one circuit has ruled with respect to *Doyle*-type situations that a comment is deemed to

be such a reference if either (1) it was the prosecutor's manifest intention to refer to the defendant's silence, or (2) the remark was of such a character that the jury would "naturally and necessarily" take it to be a comment on the defendant's silence. *United States v. Edwards*, 576 F.2d 1152, 1154 (5th Cir. 1978). This standard is identical to that followed by the Seventh Circuit in cases where the issue is whether indirect prosecutorial statements constitute impermissible comment upon the defendant's failure to testify at trial, *United States v. Muscarella*, 585 F.2d 242, 249 (7th Cir. 1978); *United States v. Buege*, 578 F.2d 187, 188 (7th Cir. 1978); *United States v. Lyon*, 397 F.2d 505, 509 (7th Cir. 1968), and we see no reason why the same standard should not be equally applicable here.

Evaluating the challenged comments by reference to this standard, we cannot conclude that they were "manifestly intended" to refer to petitioner's silence. There are indications that the prosecutor's choice of words was not accidental and might well have been intentional, particularly in his repeated use of the word "they." T.Tr., at 250. However, in light of the dominant focus of the closing arguments on the impeachment of Ms. Walls and of the fact that the prosecutor did not cross-examine petitioner with respect to his failure to come forward at any time prior to trial, we cannot conclude that he "manifestly intended" to include petitioner in his remarks. Notwithstanding this conclusion, we find the prosecutor's remarks to be of such a character that the jury would "naturally and necessarily" take them to be a comment on the defendant's silence. Repetition of the word "they", in contrast to the immediately prior comments which were focused only upon Ms. Walls' silence, is juxtaposed so as to call the jury's attention to the petitioner's as well as Ms. Walls' silence. Morever, while the reference to "anybody" in the rebuttal argument is of lesser importance and of itself would be inadequate to justify a finding of improper comment, *see United*

States v. Aldridge, 484 F.2d 655, 660 (7th Cir. 1973) (single ambiguous comment held not to warrant reversal), the implicit reference of this word to both Ms. Walls and petitioner and the arguable reference of this clause to their joint silence up until trial reinforced the comment upon petitioner's silence contained in the preceding comments.

This is a close case. Moreover, we recognize that defense counsel's failure to object at the time of the prosecutor's closing argument is a factor to be weighed in deciding whether or not the prosecutor's remarks are to be considered as improper comments. *See United States v. Hansen*, 583 F.2d 325, 331 (7th Cir. 1978); *United States v. Reicin*, 497 F.2d 563, 573 (7th Cir. 1974); *United States v. Lyon, supra*, 397 F.2d at 509.[3] Nonetheless, we find that these closing arguments would naturally and necessarily be taken by the jury as a comment on the defendant's failure to come forward prior to trial with notice of his alibi defense.

Having concluded that the prosecutor's comments were directed towards the petitioner's failure to come forward at any time prior to trial with his alibi defense, the question remains whether these comments constitute constitutional error. Petitioner relies primarily on *Doyle v. Ohio, supra*, and *Hale v. United States*, 422 U.S. 171 (1975) in support of his contention that these comments were constitutional error. However, a careful reading of these decisions shows that, while important to analyzing whether or not the prosecutor's

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[3] In addition to failing to object to these comments on the petitioner's pretrial silence, petitioner's trial counsel failed to object to two other prosecutorial comments during closing argument which comments were found by the Illinois Appellate Court to have been error. *See People v. Smith, supra*, 52 Ill.App.3d at 589-90, 367 N.E.2d at 760-61. Under such circumstances, we are reluctant to give counsel's failure to object significant weight.

comments in this case constitutional error, neither controls this case.

In *Hale*, the Supreme Court, exercising its supervisory powers over the lower federal courts, held on nonconstitutional grounds that a defendant's silence at the time of arrest and during police interrogation lacked significant probative value and that "any reference to silence under such circumstances carried with it an intolerably prejudicial impact." 422 U.S. at 180. In *Doyle*, the Supreme Court extended the *Hale* rationale, and held that use of a defendant's silence at the time of arrest and after having received *Miranda* warnings to impeach the defendant's exculpatory story given for the first time at trial violated due process. In so holding, the Court adduced two reasons in support of its constitutional rule. First, as set forth in *Hale*, the ambiguity of post-arrest, post-*Miranda* warning silence was so great as to deprive the silence of significant probative value. 426 U.S. at 617. Second, since the *Miranda* warnings themselves implicitly assured the defendant that his silence would not be used against him, it would be fundamentally unfair to later allow use of the silence to impeach an exculpatory explanation. 426 U.S. at 618.

While *Doyle* established a constitutional rule based on the due process clause against impeachment use of a defendant's silence while under arrest and after having received *Miranda* warnings, the Court was careful to specify that it did not consider other constitutional claims raised by the petitioners. 426 U.S. at 616 n.6. The Court specifically noted that it did not reach petitioners' claim, essentially identical to that raised here by petitioner Smith, that constitutional error had been committed by the prosecutor's cross-examination and comment in closing argument directed towards the petitioners' failure to have told their exculpatory story at any time prior to trial. *Id.* Moreover, the Court noted that "different considerations" would be involved in such a case. *Id.*

To this Court's knowledge, no federal court has endeavored since *Doyle* to analyze the "different considerations" which are at play when the prosecutorial comment is directed towards the defendant's general failure to come forward and give notice of his alibi prior to trial.[4] Some guidance as to the constitutional considerations at play in this situation may be gleaned, however, from the dissenting opinion in *Doyle*.

Justices Stevens, Blackmun, and Rehnquist, dissenting in *Doyle*, would have reached the constitutional issue reserved by the majority and at stake in this case and would have resolved this issue adversely to the petitioners. Relying primarily on the continued existence of *Raffel v. United States*, 271 U.S. 494 (1926), in which the Court had held that a defendant's failure to take the stand at his first trial could be used to impeach the defendant on cross-examination when the defendant took the stand in his second trial, these justices would have concluded that, until *Raffel* is expressly overruled, a state court is free to "regard the defendant's decision to take the stand as a waiver of his objection to use of his . . . failure to offer his version of the events prior to trial." 426 U.S. at 633

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[4] Several federal courts have explicitly noted that the Supreme Court reserved decision in *Doyle* upon whether the defendant's general silence in failing to come forward prior to trial with a story told at trial can be used for impeachment purposes. *United States v. Mireles*, 570 F.2d 1287, 1292 n.8 (5th Cir. 1978); *Hayton v. Egeler*, 555 F.2d 599, 602 (6th Cir. 1977). *Cf. Pineda v. State of Florida*, 564 F.2d 1163, 1165 (5th Cir. 1977) (need not decide whether *Doyle* should be extended to silence at a preliminary hearing).

At least one state court, relying on the reserved issues in *Doyle*, has concluded on the authority of *Raffel v. United States*, 271 U.S. 494 (1926), that a defendant's silence at a preliminary hearing can be used to impeach his testimony at trial. *Franklin v. State*, No. 57.348 (Tex.Crim.App. May 24, 1978) (en banc). This decision was reached over a vigorous dissent, and has been criticized. 10 St. Mary's L.J. 632 (1979).

(Stevens, J., dissenting). Notwithstanding this conclusion, the dissenting justices expressed serious doubts as to the probative value of a defendant's decision not to divulge his defenses prior to trial. *Id.*, at 631-632.

While the dissenting opinion in *Doyle* points toward a finding of no constitutional error in this case, we conclude that the "different considerations" present in this case do not prevent the error from attaining constitutional proportions. In fact, considerations precisely parallel to the two rationales articulated by the *Doyle* majority are present in this case. First, as a general matter, a defendant's failure to come forward prior to trial with an alibi defense is certainly no less "insolubly ambiguous" than is the defendant's silence at the time of arrest. Where the defendant has been given *Miranda* warnings and been thereby apprised of the fact that his statements could be used against him, where the defendant retains his fifth amendment privilege against self-incrimination, and where the defendant has counsel who might well have encouraged him to say nothing to the prosecution with respect to his possible defenses, the defendant's failure in the usual case to come forward with an alibi defense is certainly not significantly inconsistent with his testimony as to the alibi defense at trial. Moreover, while the record in this case is sparse since the prosecutor never cross-examined petitioner with respect to his failure to give the alibi defense before the trial, the record clearly demonstrates that petitioner's trial counsel had deliberately withheld giving the prosecutor notice of the petitioner's alibi defense.[5] Under such circumstances, petitioner's pretrial failure to come forward with his alibi defense is of extremely questionable probative value, while its potential for prejudice can hardly be doubted.

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[5] See T.Tr., at 3-22.

Second, even assuming the continuing viability of the *Raffel* decision,[6] the prosecutorial comments directed towards the petitioner's failure to come forward prior to trial with his alibi violated fundamental fairness. While this case is distinguishable from *Doyle* in that the silence addressed by the comment was not solely that during the post-*Miranda* warning, post-arrest period, the fact that *Miranda* warnings are given and that a criminal defendant retains his fifth amendment right against self-incrimination is of continuing relevance to the fact of a defendant's silence throughout the pretrial period. Moreover, in this specific case, the record clearly demonstrates that petitioner's trial counsel deliberately withheld giving notice of the alibi defense and the identity of the alibi witness until the day of trial. In making this deliberate choice, the petitioner's counsel relied on his conclusion that under *Wardius v. Oregon*, 412 U.S. 470 (1973), the Illinois Alibi Defense statute, Ill. Rev. Stat. ch. 38, § 114-14, was unconstitutional in its failure to provide reciprocal discovery by the defendant once the defendant had provided notice of his alibi.[7] Under such circumstances, we believe it was fundamentally unfair and a denial of due process for petitioner's silence to be used to attack his alibi offered

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[6] The *Raffel* decision has clearly been substantially circumscribed insofar as it is applicable in federal courts. *See United States v. Hale, supra; Stewart v. United States*, 366 U.S. 1 (1961); *Grunewald v. United States*, 353 U.S. 391 (1957). The Supreme Court in *Hale* specifically noted that since its decision was reached on nonconstitutional grounds, there was no need to decide whether *Raffel* was viable constitutional law. 422 U.S. at 175 n.4. Under such circumstances, the continued viability of *Raffel* is clearly questionable. *United States v. Vega*, 589 F.2d 1147, 1152 n.3 (2d. Cir. 1978).

[7] *See* T.Tr., at 3-22. The argument as to the unconstitutionality was upheld in *People v. Fields*, 59 Ill.2d 516, 322 N.E.2d 33 (1975). *See also United States ex rel. Hairston v. Warden*, 597 F.2d 604, 608 (7th Cir. 1979); *Allison v. Gray*, No. 77-1543 (7th Cir. July 30, 1979)

at trial. *See Moore v. Black,* 527 F.2d 1, 3-4 (6th Cir. 1975); *United States v. Brinson,* 411 F.2d 1057, 1060 (6th Cir. 1969). *Cf. United States v. Franklin,* 586 F.2d 560, 570 (5th Cir. 1978) (questions directed towards revealing a defendant's general pre-trial silence are improper); *United States v. Meneses-Davila,* 580 F.2d 888, 891 (5th Cir. 1978) (without consideration of "different considerations," held prosecutorial inquiry as to defendant's general pretrial silence as to exculpatory story given at trial to be a "blatant" violation of *Doyle).*

Accordingly, we hold the prosecutor's comments in closing argument which called the jury's attention to petitioner's pretrial silence with respect to his alibi to be constitutional error.

HARMLESS ERROR

Notwithstanding our conclusion that the prosecutor's comments were constitutional error, respondent contends that such error was harmless beyond a reasonable doubt as required by *Chapman v. California,* 386 U.S. 18, 24 (1967). In light of the evidence presented at trial, we cannot agree.

The evidence presented at petitioner's state court trial, while clearly sufficient to sustain the jury verdict of guilty, *see People v. Smith, supra,* 52 Ill.App.3d at 588, 367 N.E.2d at 760, was not exceedingly strong. The prosecution's only substantive witness was the robbery victim who testified that she had viewed the defendant during the course of the robbery for two or three minutes. While the lighting was good, the victim testified that the robber had been wearing a wide brimmed hat which cast shadows over a portion of his face. Moreover, the victim originally described the robber as 5'8" tall, while in fact petitioner is 6'2". Five days after the robbery, the victim picked the petitioner's picture out from a set of 8 or 9 photographs. She again identified petitioner at a

line-up of 9 or 10 men some four months later, but at this line-up all of the men were seated thereby preventing a test of the victim's recollection of the robber's height. The only other prosecution witness testified to having witnessed the line-up at which the victim identified the petitioner. In opposition to this testimony, both Ms. Walls and petitioner testified that they had been home together on the night of the robbery.

In determining whether the error was harmless beyond a reasonable doubt, the question is whether there is a reasonable possibility that the error might have contributed to the conviction. *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963). In a trial like petitioner's, the credibility of the witnesses and of the defendant are of crucial significance. While Ms. Walls' testimony in support of petitioner's alibi was substantially impeached at trial, we cannot conclude that the petitioner's alibi defense was transparently frivolous. Under all of the circumstances, where the jury would "naturally and necessarily" have taken the prosecutor's closing arguments as an effort to impeach petitioner's credibility and alibi defense by virtue of his pretrial silence, we cannot conclude that the error was harmless beyond a reasonable doubt.[8] *See United States ex rel. Allen v. Rowe*, 591 F.2d 391, 393 (7th Cir. 1979); *Chap-*

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[8] Respondents have also argued that the comments were harmless beyond a reasonable doubt by virtue of certain jury instructions given by the trial judge to the jury. Specifically, respondents rely upon the instructions that the jury must find petitioner guilty beyond a reasonable doubt from the evidence presented at trial, and that the arguments of counsel were not evidence. T.Tr., at 268, 275-76.

Under some circumstances, jury instructions may have a curative effect upon prior error in referring to a defendant's silence. *See United States v. Hansen, supra*, 583 F.2d at 332. However, this rule is by no means absolute. *United States. v. Buege, supra*, 578 F.2d at 189; *United States v. Edwards, supra*, 576 F.2d at 1154. The instructions relied upon

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man v. United States, 547 F.2d 1240, 1249 (5th Cir. 1977). Petitioner is entitled to a new trial.[9]

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here by respondent were general in nature and were not directed toward the specific issue of whether petitioner could properly be impeached by his pretrial silence. In fact, a reading of the entire jury instructions shows that at no time was this constitutional problem addressed. We therefore find no basis for concluding that the jury instructions rendered the constitutional error harmless beyond a reasonable doubt.

[9] Since the Supreme Court's holding in *Doyle* expressly reserved judgment in a case such as this one, we need not address respondents' argument that *Doyle* should not be applied retroactively.

Assuming *arguendo* that the issue of *Doyle's* retroactivity was necessary to a decision of this case, we would find *Doyle* retroactive. While no federal decision has to this Court's knowledge yet decided the question of whether *Doyle* should be given full retroactive effect, several decisions have intimated that *Doyle* is to be considered applicable to those cases which were on appeal at the time of the *Doyle* decision. *See Chapman v. United States*, 547 F.2d 1240, 1246-47 (5th Cir. 1977); *United States v. Lenardo*, 420 F.Supp. 1148, 1157 (D. N.J. 1976), *remanded without pub. op.*, 542 F.2d 1168 (3d Cir. 1976). The Seventh Circuit has recently affirmed habeas corpus relief on *Doyle* grounds for an Illinois prisoner whose conviction had been affirmed by the Illinois Appellate Court shortly before *Doyle* was decided, *United States ex rel. Allen v. Rowe, supra*, though this question was reached without discussion of the retroactivity question.

While this limited authority supports the conclusion that *Doyle* should be given retroactive effect at least to cases on direct appeal at the time of the *Doyle* decision, *see United States v. Fitzgerald*, 545 F.2d 578, 582 (7th Cir. 1976), explicit consideration of the criteria set forth by the Supreme Court in *Stovall v. Denno*, 388 U.S. 293 (1967), supports the conclusion that *Doyle* be given retroactive effect. Insofar as the *Doyle* decision rests upon the extension of the rationale of *Hale* of ensuring that only probative evidence will be used at trial, the "purpose" of the *Doyle* rule is directed towards the reliability of the truth-finding process at trial. Such a purpose has sometimes been held a sufficient condition to

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infer retroactivity. *See Chapman v. United States*, 547 F.2d 1240, 1247 n.12 (5th Cir. 1977).

Respondents contend, however, that the question of *Doyle's* retroactivity should be analyzed by reference to *Tehan v. Shott*, 382 U.S. 406 (1966), which denied full retroactive effect to *Griffin v. California*, 380 U.S. 609 (1965). While it is clear that the *Griffin* decision was in part premised upon the accuracy of the truth-finding process, *see Johnson v. New Jersey*, 384 U.S. 719, 729 (1966), the decision in *Tehan* to deny retroactivity was based upon the weight of the remaining factors in the *Stovall* analysis, i.e., the extent of reliance upon the old rule and the effect on the administration of justice of a retroactive application of the new rule. 388 U.S. at 297. Unlike the Supreme Court's findings in *Tehan* with respect to retroactive application of *Griffin*, we do not believe that either of these remaining factors presents a serious argument against retroactive application. Insofar as the respondents' reliance upon prior precedent is concerned, the *Doyle* decision appears to be the logical successor to the Court's opinion in *Miranda v. Arizona*, 384 U.S. 436, 468 n.37 (1966). Insofar as "the effect on the administration of justice" by virtue of retroactive application of *Doyle* is concerned, we have no reason to believe that there have been "countless triais" where there has been prosecutorial reference to a defendant's post-arrest silence. Illinois law prior to *Doyle* had apparently already held it to be reversible error to bring out the fact of a defendant's silence at the time of arrest. *People v. Rothe*, 358 Ill. 52, 57, 192 N.E. 777 (1934).

Accordingly, were the question of retroactivity properly before us, we would hold *Doyle* retroactive to apply to this case.

Accordingly, petitioner's motion for summary judgment is granted, and the judgment of conviction is vacated. However, the writ of habeas corpus shall not issue for a period of 120 days in order to afford the State of Illinois the opportunity to initiate new trial proceedings. If petitioner is not brought to trial within 120 days from the date of this order, the writ shall issue.

An appropriate order will enter.

/s/ HUBERT L. WILL
United States District Judge

DATED: AUG. 21, 1979
A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

Opposition

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1561

MICHAEL P. LANE, et al.,

Petitioners,

-vs-

MELVIN LEE SMITH,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

IN FORMA PAUPERIS

ANDREW BERMAN
Assistant Public Defender
Cook County Public Defender
1100 S. Hamilton
Chicago, Illinois 60612
(312) 738-8557

ALAN D. GOLDBERG
Assistant Appellate Defender
Office of the State Appellate Defender
109 North Dearborn Street
8th Floor
Chicago, Illinois 60602
(312) 793-5472

COUNSEL FOR RESPONDENT

MICHAEL MULDER, ESQ.
Valparaiso, Indiana

OF COUNSEL

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IN FORMA PAUPERIS*

PRAYER

The Respondent, Melvin Lee Smith, respectfully requests that a writ of certiorari not issue to the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, United States of America ex rel. Smith v. Rowe, is reported at 618 F. 2d 1204 (7th Cir., 1980). The opinion of the United States District Court was not published, but was adopted by the Court of Appeals. A second opinion upon remand from this Court, United States ex rel. Smith v. Franzen, is reported at 660 F.2d 237 (7th Cir., 1981).

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*Melvin Smith proceeded in forma pauperis in the District Court and in the Court of Appeals and was granted leave to proceed in forma pauperis in this Court on the previous occasion where the State petitioned for Certiorari, Franzen v. Smith, 449 U.S. 810 (1980). Mr. Smith respectfully requests leave to proceed in forma pauperis in the instant case, and a motion to this effect is being filed with this brief.

JURISDICTION

The Director of the Illinois Department of Corrections and the Sheriff of Kane County, Illinois, seek this Court's jurisdiction and invoke 28 U.S.C. §1254(1).

QUESTION PRESENTED

Did the District Court and the Court of Appeals correctly hold that Melvin Smith's privilege against self-incrimination was violated by the prosecution's use of his failure to come forward to law enforcement authorities with his alibi defense five months after his arrest and after having been advised by his attorney not to reveal his alibi defense?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War of public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ADDITIONAL STATEMENT OF THE CASE

Melvin Lee Smith was indicted by a Kane County, Illinois grand jury on June 3, 1974 for the March 26, 1974 armed robbery of Claudia Watson. (C. 21)[1] The indictment followed an April

[1] (C.) refers to the Common Law Record.

29, 1974 preliminary hearing at which Smith's presence was waived by defense counsel so that the complainant's opportunity to view him there would not taint any subsequent attempt at identification. (P.H.Tr. 10-11)[2]

When the case proceeded to trial on September 30, 1974, the State's motion to compel discovery of Smith's alibi witnesses was allowed. (T.Tr. 3-22)[3] Prior to the day of trial, defense counsel had deliberately withheld giving notice of the alibi defense and the identity of the alibi witness based upon counsel's belief that the Illinois Alibi Defense statute was unconstitutional. Pursuant to the court's ruling defense counsel informed the State that Betty Walls would be the defense only potential alibi witness. (T.Tr. 36)

The complaining witness, Claudia Watson, was working as a night auditor at the Hilton Inn in North Aurora, Illinois. (T.Tr. 165) At about 1:15 a.m. on March 26, 1974, while working at the counter in the front lobby, a man approached her, pointing a gun in her direction. (T.Tr. 172-173) The man told her it was holdup, and two other men entered the lobby, one of whom was wearing a ski mask and carrying a gun. (T.Tr. 175-176) The second of these two men, identified at trial by Ms. Watson as Melvin Smith, was according to Ms. Watson, five feet, eight inches tall. (T.Tr. 176) Since he stood on the other side of the counter from her, she could not tell whether or not this man, like the man in the ski mask, was wearing platform shoes. (T.Tr. 176)

Two of the men, including the one identified as Smith, came around behind the counter and Smith was handed a gun. Ms. Watson was told to open the cash register. (T.Tr. 178) The man wearing a ski mask took the money out of the register, and handed it to the man identified as Smith. (T.Tr. 179) The man with the ski mask also demanded and received the

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[2](P.H.Tr) refers to the record of the preliminary hearing on April 29, 1974.

[3](T.Tr.) refers to the transcript of the trial.

money from Ms. Watson's purse. (T.Tr. 180) She was told to lie face down on the floor, (T.Tr. 180) and the man left several minutes later, whereupon she telephoned the police. (T.Tr. 184)

Five days later, on March 31, Ms. Watson viewed eight or nine photographs at the Aurora Police Department. (T.Tr. 185) She picked out two photographs, Smith's and one she thought, but was not certain, was the man in the ski mask. (T.Tr. 186) Ms. Watson studied the photographs for twenty minutes before selecting Melvin Smith's, and did so after having first selected the photograph of a Felix Benson. (P.H.Tr. II, 12-14)[4]

On September 19, 1974, nearly six months after the robbery, Ms. Watson viewed a line-up consisting of nine or ten black males, all of whom were seated, (T.Tr. 202) and selected Smith from the line-up. (T.Tr. 186-189)

On cross examination, Ms. Watson testified that the man she identified as the defendant was, on the night in question, wearing a hat with a wide brim (T.Tr. 190) which shaded the upper part of his face (T.Tr. 193) and that the overhead lights were behind the man, not shining in his face. (T.Tr. 191-192) Because of the lighting she could not be certain if the man had a mustache. (T.Tr. 193)

When questioned about the preliminary hearing, Ms. Watson recalled seeing black men sitting in the courtroom, but but Melvin Smith was not amony them. (T.Tr. 195-196)

Betty Walls, with whom Melvin Smith had been living at the time of the robbery, (T.Tr. 210) testified that she and Smith were at home that night, and recalled that they were up late playing cards. (T.Tr. 212)

On cross-examination Ms. Walls testified that a police officer had come to her residence the night before the trial,

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[4] (P.H.Tr. II) refers to the record of the preliminary hearing continued to May 1, 1974.

but she had not talked with the officer. Melvin Smith was also present at that time. (T.Tr. 225)

Melvin Smith, testifying in his behalf, recalled that he had been at home with Ms. Walls on the night of the robbery. (T.Tr. 232-233) Smith testified that he was six feet, two inches tall. (T.Tr. 233) During the April 29, 1974 preliminary hearing, Smith was sitting in the courtroom with two other black men. (T.Tr. 234) When the police officer came to interview Ms. Walls, Smith told him that he could talk with Ms. Walls in the presence of his lawyer. (T.Tr. 236)

During the State's closing and rebuttal arguments (Reprinted in footnote 1 of the District Court's opinion), several comments were made by the prosecutor which are the basis of Melvin Smith's federal claim.

On January 30, 1975 a hearing was held on his post-trial motion. At this hearing Smith was represented by new counsel who argued all of the points of law on which Smith based his state court appeals and his federal habeas corpus petition. (P.T.Tr. 1-89)[5] Smith, who had never been previously charged with a criminal offense of any kind, was given the lowest sentence possible under the Illinois law in effect at the time. (P.T.Tr. 90-92) His real estate bond was allowed to remain in effect during the pendency of his state appeals, (P.T.Tr. 105) and on July 24, 1978 United States District Judge John P. Crowley granted Mr. Smith's motion to set bond on his habeas corpus petition, allowing him to post the same real estate bond that had been used as security in the state court.

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[5](P.T.Tr.) refers to the record of the post-trial proceedings.

REASONS FOR DENYING THE WRIT

I

THE UNIQUE FACTUAL CIRCUMSTANCES IN THIS CASE AND THE REMOTE LIKELIHOOD OF A RECURRENCE MAKES THIS AN INAPPROPRIATE CASE FOR THE COURT TO DECIDE A QUESTION LEFT OPEN BY DOYLE V. OHIO.

Subsequent to the State of Illinois filing its second Petition for a Writ of Certiorari, this Court decided Fletcher v. Weir, ___ U.S.___, 71 L.Ed.2d 490 (1982). On April 13, 1982, after the decision in Fletcher, this Court ordered respondent Melvin Smith to respond to the State's Petition. Because Fletcher appears to narrow the scope of an issue left open in Doyle v. Ohio, 426 U.S. 610 (1976), but also appears to support the finding of a Doyle violation under the unique factual circumstances in the instant case, Mr. Smith will address the impact of Fletcher on his case. Further, Mr. Smith will argue that the unusual circumstances of his nine-year old case are so unlikely to recur that it would be an inappropriate case for resolving the broad issue reserved in Doyle.

A. Where Defendant Was Advised By His Attorney Not To Reveal His Alibi To The Authorities, It Is Irrelevant Whether Or Not He Received Miranda Warnings Prior To Remaining Silent.

It is Melvin Smith's position that the facts in the record and fundamental fairness require that it be assumed that Miranda warnings were given upon his arrest (See Section B of this argument). However, even assuming that Melvin Smith was not given Miranda warnings at arrest, there are compelling factual and legal grounds for the Court of Appeals to twice conclude that the comments on Mr. Smith's silence were constitutional error.

In the recently decided Fletcher v. Weir, ___U.S.___, 71 L.Ed.2d 490 (1982), the defendant claimed at trial that he acted in self-defense, a claim he did not assert when he was arrested

17 hours after the incident. The State's impeachment of defendant Weir was based upon his silence immediately following his arrest, apparently before Miranda warnings were given. Weir v. Fletcher, 658 F.2d 1126, 1129 (6th Cir., 1981). In the present case, a warrant for Melvin Smith's arrest was executed on April 1, 1974. (C. 11) The incident with which he was charged occurred on March 26, 1974. On April 29, 1974 there was a preliminary hearing, at which Smith was represented by his eventual trial counsel, and he was indicted on June 3, 1974. The silence which was the subject of the prosecutor's comments occurred during the evening of September 30, 1974, the day on which the trial had commenced with a jury having been sworn in. (T.Tr. 155)

Thi Court concludes its opinion in Fletcher v. Weir by stating:

> In the absence of the sort of affirmative assurances embodied in the Miranda warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to post-arrest silence when a defendant chooses to take the stand. A State is entitled, in such situations, to leave to the judge and jury under its own rules of evidence the resolution of the extent to which post-arrest silence may be deemed to impeach a criminal defendant's own testimony. 71 L.Ed.2d at 494. [Emphasis added.]

Even assuming, arguendo, that Miranda warnings were not given, there is certainly no "absence of the sort of affirmative assurances embodied in the Miranda warnings." The record clearly reveals, as the District Court and Court of Appeals held, that defense counsel had decided to withhold notice of Mr. Smith's alibi defense, based upon counsel's correct conclusion that the Illinois discovery statute at the time was unconstitutional. U.S. ex rel. Smith v. Rowe, 618 F.2d 1204, 1206, 1213 (7th Cir., 1980); U.S. ex rel. Smith v. Franzen, 660 F.2d 237, 240 (7th Cir., 1981). Furthermore, Melvin Smith had been represented by an attorney for a period in excess of five months prior to the silence with which the pro-

secutor impeached him. It can hardly be doubted that any defendant represented by counsel will have been informed (usually in no uncertain terms) that he is not to speak with anyone, least of all the police, about the facts in the case. In the case at bar, this is more than an inference, rather it is supported in the record by counsel's determination to withhold alibi information. Respondent Smith submits that the advice of counsel to remain silent is not only the "sort of affirmative assurance" contained in Miranda warnings, but is an even greater assurance, as it is an assurance by an attorney to his client.

Doyle v. Ohio, 426 U.S. 610 (1976), left open an issue presented in this case, a fact recognized by the Court of Appeals. U.S. ex rel. Smith v. Rowe, 618 F.2d 1204, 1206 (7th Cir., 1980); U.S. ex rel. Smith v. Franzen, 660 F.2d 237, 239 (7th Cir., 1981). That issue is whether constitutional error occurs when a defendant is impeached with his failure to make an exculpatory statement at any time (other than at arrest) prior to trial. Id. at 426 U.S. 616 n.6. Doyle states that while Miranda warnings carry no express assurance that silence will carry no penalty, it would be fundamentally unfair and a deprivation of due process to allow the arrestee's silence to be used against him as impeachment. Id. at 426 U.S. 618. Similarly, it would be at least as unfair for a defendant's silence to be used against him after his attorney had given him the same assurances. In addition to the unusual circumstances of this case where the silence occurred five months after arrest and upon advice of counsel, there are other unusual circumstances in this case which make it an appropriate one to resolve the issue left open in Doyle. Melvin Smith's defense was that of alibi. Doyle and this Court's cases subsequent to Doyle involve defenses of a significantly different nature, entrapment (Doyle) or self-defense (Jenkins v. Anderson, 447 U.S. 231 (1980) and Fletcher v. Weir, ___U.S.___, 71 L.Ed.2d 490 (1982)).

Fletcher, quoting from Jenkins, recognized that silence is more significant in some situations than others:

> "Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact and circumstances in which that fact naturally would have been asserted. 3A J. Wigmore, Evidence, §1042, p. 1056 (Chadbourn rev 1970). Each jurisdiction may formulate its own rules of evidence to determine when prior silence is so inconsistent with present statements that impeachment by reference to such silence is probative." 71 L.Ed.2d 493-4.

A basic distinction between an alibi defense and all others (e.g., insanity, self-defense, compulsion, entrapment) is that the defendant, by asserting a defense other than alibi, admits his presence at the incident. Thus, in those situations it can be assumed, as Jenkins and Wigmore observe, that it would be natural to assert the facts underlying the defense. Alibi, however, by its very nature assumes the absence of the defendant from the scene of the incident. In such cases a general denial or silence would be more natural.

Finally, it is interesting that Illinois law dating back to well before the Miranda case has proscribed impeachment by silence at the time of arrest, People v. Rothe, 358 Ill. 52, 57, 192 N.E.777 (1934), which (if Miranda is not a factor) a fortiori applies to silence at any time after the arrest. Thus the Court of Appeals decision in this case, though based upon the United States Constitution, is consistent with prior state law, a fact noted by the Court of Appeals. U.S. ex rel. Smith v. Rowe, 618 F.2d 1204, 1214 n.9 (7th Cir., 1980).

B. The Record Permits The Inference That Miranda Warnings Were Given At The Time Of Defendant's Arrest.

If it is assumed that Miranda warnings were given to Melvin Smith at the time of his arrest, any impeachment of Mr. Smith by his subsequent silence not only contradicts the assurances by his attorney that Smith had a constitutional right to remain

silent, but would also violate similar assurances given by the police. The Court of Appeals noted that although there was nothing in the record to indicate whether or not Melvin Smith received Miranda warnings, the presumption was that proper procedure was followed. Additionally, the court inferred from Mr. Smith's statements to the police on the night before trial that he was aware of his rights to remain silent and have an attorney present during questioning. Furthermore, the State of Illinois must agree with the Court of Appeals that the police should be presumed to have acted properly as the State has never raised the issue of whether Miranda warnings were given until the present Petition. It is understandable that the State would not contend that police officers, who are its agents, would fail to properly carry out their jobs. Since the State has not questioned the propriety of its own agents' actions in nearly six years of appellate litigation, they should not be allowed to attack the competence of those agents at the eleventh hour, long after any factual disputes should have been raised and settled.

Finally it would be unfair to place the burden of showing Miranda warnings were given on the defendant. The comments at issue here occurred in closing argument, after both sides had rested. To place a burden on the defendant to prove compliance with the law by the police would be to require every defendant who had previously remained silent to anticipate impeachment, perhaps as late as argument. More importantly, it would create a presumption of misconduct by police, a presumption found no where else in the law.

II

THE COURT OF APPEALS PROPERLY DISTINGUISHED JENKINS V. ANDERSON.

Upon remand from this Court, the Court of Appeals addressed itself to the application of Jenkins v. Anderson, 447 U.S. 231

(1980), to this case. U.S. ex rel. Smith v. Franzen, 660 F.2d 237 (7th Cir., 1981) The Court of Appeals held that Jenkins addressed itself to pre-arrest silence, and that the instant case concerned only post-arrest silence. The court also reiterated that its holding was bolstered by the refusal of defense counsel to reveal defendant's alibi, a factor not present in Jenkins or Raffel v. United States, 271 U.S. 494 (1926), a case also relied upon by the State.

Melvin Smith submits that the Jenkins - Raffel issue and the factual issues raised in parts II and III of the State's Petition have been properly resolved, and that it would be inappropriate to relitigate factual questions in this Court.

CONCLUSION

WHEREFORE, Melvin Lee Smith respectfully requests this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

Andrew Berman BI 49

ANDREW BERMAN
Assistant Public Defender
Cook County Public Defender
1100 S. Hamilton
Chicago, Illinois 606012
(312) 738-8557

ALAN D. GOLDBERG
Assistant Appellate Defender
Office of the State Appellate Defender
109 North Dearborn Street
8th Floor
Chicago, Illinois 60602
(312)793-5472

COUNSEL FOR RESPONDENT

MICHALL MULDER, ESQ.
Valparaiso, Indiana

OF COUNSEL

IN THE

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OCTOBER TERM, 1981

No. 81-1561

MICHAEL P. LANE, et al,

Petitioners,

-vs-

MELVIN LEE SMITH,

Respondent.

IN FORMA PAUPERIS

NOTICE AND PROOF OF SERVICE

TO: Michael Weinstein
Assistant Attorney General
State of Illinois
188 West Randolph
Chicago, Illinois 60601

You are hereby notified that on May 11, 1982, we mailed the original and nine copies of the Brief in Opposition to Petition for Writ of Certiorari and the original and nine copies of the Motion to Proceed in Forma Pauperis to the Clerk of the above Court, copies of which are hereby served on you.

Alan D. Goldberg
ALAN D. GOLDBERG
Assistant Appellate Defender

STATE OF ILLINOIS)
)SS
COUNTY OF COOK)

The undersigned being first duly sworn on oath deposes and says that he mailed the original and nine copies of the Brief in Opposition to Petition for a Writ of Certiorari and the original and nine copies of the Motion to Proceed in Forma Pauperis to the Clerk of the above Court, and three copies of each to the Attorney General of Illinois, by depositing them in the U.S. Mail in Chicago, postage prepaid and properly addressed. He further states that he is a member of the bar of this Court. (Court's copies sent by express mail)

Alan D. Goldberg
ALAN D. GOLDBERG
Assistant Appellate Defender

SUBSCRIBED AND SWORN TO BEFORE ME
this 11th day of May, 1982.

Victoria Engel
NOTARY PUBLIC

ORIGINAL.

IN THE

SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1981

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Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

Respondent Melvin Lee Smith, by his attorneys, Andrew Berman, Assistant Public Defender, and Alan D. Goldberg, Assistant Appellate Defender, moves that this Court grant permission to proceed in forma pauperis pursuant to United States Supreme Court Rule 46.

In support of this motion, Alan D. Goldberg states on oath:

1. Melvin Smith proceeded in forma pauperis in the District Court and in the Court of Appeals and was granted leave to proceed in forma pauperis in this Court on the previous occasion where the State petitioned for certiorari, Franzen v. Smith, 449 U.S. 810 (1980).

2. An affidavit of indigency will be forwarded to this Court shortly.

Respectfully submitted,

Alan D. Goldberg

ALAN D. GOLDBERG
Assistant Appellate Defender

SUBSCRIBED AND SWORN TO BEFORE ME
this 11th day of May, 1982.

Victoria Engel

NOTARY PUBLIC